

## 46 Am. Jur. 2d Judges § 190

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### Judges

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### IX. Disqualification to Act in Particular Case

#### C. Remedies and Procedure

#### 4. Hearing, Determination, and Appeal

### § 190. Determination as to disqualification of judge where affidavit of prejudice not conclusive—Judge does not decide issue of disqualification

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Judges](#)  [51\(1\)](#), [51\(4\)](#)

Under some statutes or authority, recusal is neither automatic nor discretionary.<sup>1</sup> The judge is required to treat as true the facts in a properly verified and filed affidavit, and determine whether the facts are legally sufficient to support a rational inference of bias that will prevent the judge from dealing fairly with the movant, and if the facts evidence bias, it is an abuse of discretion for the judge to refuse to withdraw from the case.<sup>2</sup> If the affidavit is untimely or legally insufficient on its face, the challenged jurist may strike it, despite a proscription against judges ruling on their own disqualification, though some statutes have time restraints as to when this must be done.<sup>3</sup> A district judge before whom a case was pending had the authority to determine whether a peremptory challenge for recusal of the district judge without cause was both timely and correct, and such determination included the ability to decide who was a "party" under the statute and rule on peremptory challenges, where the statute and rule authorized the judge before whom the case was pending to decide whether the peremptory excusal was in fact timely and correct, and it was only after such determination that the district judge was permitted to proceed no further in the case.<sup>4</sup> A judge considering a motion seeking recusal must evaluate the motion and accompanying affidavit solely on their face and assume that the facts set forth in the affidavit are true, even if the judge knows them to be false or incomplete; consideration of additional evidence is inappropriate at this point in the process.<sup>5</sup> A judge who looks beyond the mere legal sufficiency of the motion and attempts to refute charges of prejudice has exceeded the proper scope of the inquiry, and this alone mandates recusal.<sup>6</sup>

Some statutes require that another judge determine the legal sufficiency of the affidavit, and if insufficient, the matter is transferred back to the original judge.<sup>7</sup>

In other jurisdictions, where the challenged judge determines the timeliness and legal sufficiency of the affidavit, if the motion is timely and legally sufficient, then the judge is required to transfer the motion to another judge for a hearing.<sup>8</sup>

Some statutes provide that if a substitution motion for cause is procedurally sound, the judge must either voluntarily disqualify from the action, or request the presiding judge of the administrative district to assign another judge to hear the motion,<sup>9</sup> although the judge against whom the motion is directed may make the initial decision as to whether it conforms with the rule governing recusals.<sup>10</sup> Even if the motion is procedurally defective, the judge must either grant it or refer it to another judge.<sup>11</sup> The challenged judge is required to transfer an untimely motion to another judge to determine whether the delay was based on good cause.<sup>12</sup>

In some jurisdictions, the judge may contradict the motion, and any factual disputes may require an evidentiary hearing, which should be conducted before another judge.<sup>13</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

While making an initial determination of the facial sufficiency affidavit of bias, on motion to recuse, the judge must not determine the truth or falsity of the facts stated therein. 28 U.S.C.A. §§ 144, 455(a). [Western Watersheds Project v. Interior Board of Land Appeals](#), 434 F. Supp. 3d 1257 (D. Utah 2020).

Because any judge, however candid, will naturally be loathe to acknowledge the judge's own partiality or bias, compounded by the judge's general duty to hear and decide matters assigned to the judge, a reviewing court gives a motion to recuse fresh eyes, owing no deference to a refusal to recuse. [Phillips v. Rosquist](#), 628 S.W.3d 41 (Ky. 2021).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [Garland v. State](#), 788 N.E.2d 425 (Ind. 2003).
- 2 [Venard v. Department of Corrections](#), 72 P.3d 446 (Colo. App. 2003); [Coleman v. State](#), 866 So. 2d 209 (Fla. 4th DCA 2004); [Brown v. State](#), 830 N.E.2d 956 (Ind. Ct. App. 2005).
- 3 [PBA, LLC v. KPOD, Ltd.](#), 112 Cal. App. 4th 965, 5 Cal. Rptr. 3d 532 (2d Dist. 2003).
- 4 [Quality Automotive Center, LLC v. Arrieta](#), 2013-NMSC-041, 309 P.3d 80 (N.M. 2013).
- 5 [Post v. State](#), 298 Ga. 241, 779 S.E.2d 624 (2015).
- 6 [Lee Memorial Health System v. State, Agency for Health Care Admin.](#), 910 So. 2d 892 (Fla. 1st DCA 2005).
- 7 [Hulme v. Woleslagel](#), 208 Kan. 385, 493 P.2d 541 (1972).
- 8 [Johnson v. State](#), 260 Ga. App. 413, 579 S.E.2d 809 (2003); [State v. Maten](#), 899 So. 2d 711 (La. Ct. App. 1st Cir. 2005), writ denied, 922 So. 2d 544 (La. 2006).
- 9 [In re Marriage of Samford](#), 173 S.W.3d 887 (Tex. App. Texarkana 2005).
- 10 [Barron v. State Atty. Gen.](#), 108 S.W.3d 379 (Tex. App. Tyler 2003).
- 11 [Mosley v. State](#), 141 S.W.3d 816 (Tex. App. Texarkana 2004), petition for discretionary review refused, (Oct. 27, 2004).
- 12 [Hudson v. Texas Children's Hosp.](#), 177 S.W.3d 232 (Tex. App. Houston 1st Dist. 2005).

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State v. Spells, 76 Conn. App. 67, 818 A.2d 808 (2003); Towbin Dodge, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark, 121 Nev. 251, 112 P.3d 1063 (2005).

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